



Maybank

Shipping Company, Inc.

January 11, 2006

BY FACSIMILE TRANSMISSION AND BY EMAIL

Director, Commodity Procurement Policy & Analysis Division
Farm Service Agency, Room 5755-S
U.S. Department of Agriculture
1400 Independence Avenue, SW
Washington, DC 20250-0512

Attn: Mr. Richard Chavez

**RE: PROPOSED RULE: PROCUREMENT OF COMMODITIES FOR FOREIGN
DONATION; 7 CFR PART 1496; RIN 0560-AH39**

Maybank Shipping Company appreciates the opportunity to provide comments on the proposed rule cited above, as announced in the Federal Register on December 16, 2005.

1. This proposed rule change is *not in compliance* with Executive Order 12866 – Regulatory Planning and Review. It is a *significant regulatory action* for the following reasons, keyed to the conditions promulgated in Section 3(f) of EO 12866:
 - a. Subpara (1): The proposed rule would likely have an *annual effect of \$100 million*. A sampling of CY 2005 round one bid offers and round two bid offers reveals rate ranges of 6.2% - 36.2% (all bids) and 26.8% – 60.1% (P1; priority bids). Given the USAID food aid annual budget of \$1.2 billion, of which transportation expense is a substantial part, these percentage differentials indicate a major potential annual effect. The decision to dismiss this constraint must be based on a financial review of factors such as these; none was provided in the Federal Register announcement or during informal fact-finding phone calls to USDA/CCC.
 - b. Subpara (1): This rule has the potential to *adversely effect in a material way* (as discussed below) U.S. flag carriers and therefore may adversely impact the U.S. maritime industry.

- c. Subpara (2): *Non-Interference* with cargo preference mandates, although compliance is acknowledged in the rule announcement, cannot be verified since the application program has not been completed, nor has a cargo preference flow chart been provided upon which the software is to be implemented, nor has an assurance of complete and comprehensive validation testing (open to all interested parties) been provided. This is an important transparency of government issue.
- d. Subpara (4): Related to the above comment, *policy issues arising out of legal mandates* cannot be dismissed until they are identified and reviewed; this has not been accomplished. The principle upon which this rule is based (lowest landed cost) has not been overlaid upon the complex operational scenarios driven by adherence to Cargo Preference Laws nor the mandates of Federal Contracting Laws. This action is necessary to determine the absence of policy conflicts.

Recommendation: Since the above conditions cannot be shown to be non-applicable and therefore should be treated as a *significant regulatory action*, submit this proposed rule in accordance with the Unified Regulatory Agenda as specified in Section 4(b) of EO 12866.

- 2. Rationale provided in the Federal Register for second round rate adjustments cites so-called "trumping" by P1 carriers, implying that this practice is at variance with transportation efficiencies. P1 priority over P2 is mandated by cargo preference; other factors that impact second round adjustments include:
 - a. Added RFP requirements (such as fumigation, door delivery, lining protocol, etc)
 - b. Misinterpretation of first round rates by USDA KCCO (e.g., not considering bundling of offers or applicable minimum/maximum cargo amounts when using first round rate indications)
 - c. Change in market landscape and/or competitive conditions since the submission of bids in the first round (e.g., carriers dropping out or adjusting rates due to unforeseen surcharges)

Recommendation: Accommodate all factors in the determination of courses of action, in particular a possible single bid process that may impose excessively early bid submission windows (greater than 30 days).

- 3. Errorless automation of any process can be a significant challenge. Adding the complexity of a substantial procedural change at the same time makes such an endeavor highly problematic. This is even more disconcerting when there are federal law compliance issues and such a high potential to significantly impact

U.S. commerce if not implemented properly. During the software development and testing process, the following factors should be accommodated:

- a. MARAD-originated cargo preference flow chart must be incorporated.
- b. MARAD is designated as sole authority to validate compliance with federal cargo preference mandates and to authorize related system software updates/changes.
- c. Linear programs, such as the ones intended to support this process, should be able to provide the optimal solution and a sensitivity report. The sensitivity report provides the impact of constraints on the optimal solution. This is invaluable when analyzing options as well as future facts-based policy initiatives.
- d. Comprehensive modular and system testing must be open and transparent to affected agencies and industry representatives.

Recommendation: Accommodate the above factors in the software system development process.

I appreciate your consideration of these comments. Maybank Shipping Company is prepared to provide amplification or assistance in any way, and would like to participate in any maritime industry forum convened to review this process. My points of contact for this action are: David Shimp and Philip Tomlinson at (843) 723-7891.

Sincerely,



Jack Maybank, Sr.
President

Copy to:

Senator Lindsey Graham

Senator James DeMint

Congressman James Clyburn

Congressman Henry Brown

Thomas W. Harrelson, Director, Office of Cargo Preference, MARAD

Teresa C. Lasseter, Administrator, Farm Service Agency, USDA

Hubert Farrish, Deputy Administrator, Commodity Operations, FSA, USDA

Frederick W. Shieck, Acting Administrator, USAID

Denise Scherl, Chief, Transportation Division, USAID

Gloria Tosi, President, American Maritime Congress